



ASIC

Australian Securities & Investments Commission

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Principal Adviser
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

JOHN PRICE
Commissioner

Level 7, 120 Collins Street,
Melbourne
GPO Box 9827 Melbourne VIC 3001

Telephone: +61 3 9280 3200
www.asic.gov.au

By email: ACNCReview@treasury.gov.au

Dear Sir/Madam

Review of the ACNC legislation

The Australian Securities and Investments Commission (ASIC) welcomes the opportunity to provide input to the review of the *Australian Charities and Not-for-profits Commission Act 2012* and the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (together, the ACNC Acts).

Our submission sets out our observations and issues for consideration about inconsistencies, anomalies and irregularities in the interaction between the ACNC Acts and the *Corporations Act 2001* (Corporations Act) and their impact on ASIC's registers, systems and processes. It also sets out our views and support on some of the recommendations made by the ACNC in its submission to this review on reporting requirements for registered charities.

We raise these observations and issues for the Panel's consideration. ASIC would be happy to work further with the Panel or Treasury to develop and implement any changes it thinks appropriate.

ASIC and the ACNC

ASIC is Australia's integrated corporate, markets, financial services and consumer credit regulator. The objects of the *Australian Securities and Investments Commission Act 2001* (ASIC Act), include that in performing its functions and exercising its powers, ASIC must strive to receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it, and ensure that information is available as soon as practicable for access by the public.

A charity that is a company limited by guarantee registers with ASIC to establish a legal entity, and then applies for registration with the ACNC to obtain charitable status. ASIC continues to oversee the corporate status of any charitable company while the ACNC oversees the charitable status, governance arrangements and modified reporting obligations.

Certain Corporations Act provisions no longer apply to charities registered with the ACNC

In 2012, the Corporations Act was amended to introduce Pt 1.6 as a consequential amendment to the commencement of the ACNC Act.

Part 1.6 exempts a body corporate that is registered under the ACNC Act from particular requirements under the Corporations Act. The provisions that do not apply are set out in a table under s111L and include exemptions as to notifications of changes of address, provision of information about the company's officeholders and Ch 2N. Chapter 2N sets out the requirement to ensure the particulars for a company registered with ASIC are current and determines the review date for a company.

As such, the requirements under the Corporations Act to notify ASIC of certain matters, including change of address and the retirement and appointment of directors and company secretaries have been turned off for companies that are registered charities. Consequently, ASIC is unable to maintain up to date information on its registers for charitable companies.

To draw attention to the exemptions and the currency of information on ASIC's registers, we have added the 'ACNC Flag' to the public information about a company registered with the ACNC. The 'ACNC Flag' states:

Registered Charity

This company is registered as a charity with the Australian Charities and Not-for-Profits Commission (ACNC). For further information on the charity, including the address for service, details of responsible persons (for example company directors) and financial reports, search the Charities register at www.acnc.gov.au.

Reliance on ASIC's Registers

Sections 127(1) and (2) of the Corporations Act provide that a company may execute a document without using a common seal if the document is signed by two directors or a director and a company secretary of the company, and a company with a common seal may execute a document if the seal is fixed to the document and the fixing of the seal is witnessed by 2 directors of the company or a director and a company secretary of the company.

Sections 128 and 129 of the Corporations Act set out assumptions that may be made by persons dealing with a company (including a charity). This includes the assumption under s129(2) that a person who appears on the ASIC register to be a director or company secretary is duly appointed and has the authority to perform those functions.

Although the 'ACNC Flag' warns that information on ASIC's registers may be incomplete or out of date, the public still relies on the information in ASIC's Registers and incurs costs as a result of serving the wrong person with a notice or being required to prove that the matters in an extract are incorrect for the purposes of Court proceedings or commercial applications. In the commercial context, we are aware that financial institutions in particular rely on information in the ASIC registers being current, and have experienced significant impediments as a result of the shift of up-to-date information about a charitable company from the ASIC Register to the ACNC Register.

The situation outlined in the submission by Relationships Australia South Australia (RASA) on 23 February 2018 demonstrates the difficulties faced by charitable companies. There is no requirement for charitable companies to update ASIC of changes to director details. These must now be reported to the ACNC. Despite the regime being designed to reduce the regulatory burden, some third parties refuse to rely on the information on the ACNC register. Instead, they insist on relying on information on the ASIC register in accordance with ss127(1), 128 and 129 of the Corporations Act. As a result, RASA has had to re-execute documents and ultimately update director information on the ASIC company register to meet third party due diligence requirements.

Similarly to the recommendation of the ACNC in its submission to the Panel, we would support exploring options to address this issue, while not unduly raising the regulatory burden on the entities concerned.

Addresses

Notwithstanding the exemptions in the legislation to reduce the notification of address obligations for ACNC registered charitable companies, the ACNC is required to give ASIC a copy of a notice of a charitable company's change of address for service which is taken to be the address of the company's registered office. However, ASIC is not required to be notified of any other changes of address on the ASIC company register for the charitable company. This means that ASIC's registers contain some accurate information, and some out of date information, which has the potential to decrease public confidence in ASIC's registers and cause confusion.

Revocation

When a charitable company's ACNC registered status is revoked, the Pt 1.6 list of exemptions no longer applies and the legislation does not provide for any transition to resuming obligations under the revived provisions of the Corporations Act.

As charitable companies do not keep updated records with ASIC, it may be difficult to contact the companies once their charitable registration is revoked and seek an update to company details in a timely and efficient manner. The ACNC may, under s35-10 of the ACNC Act, backdate the revocation of charitable status, which leaves gaps in ASIC's register and uncertainty as to the application of the revived provisions of the Corporations Act.

Anomalies

As noted in the ACNC's submission to this Review, we would support exploring options to addressing instances where the exemptions in Pt 1.6 of the Corporations Act have resulted in anomalies which affect charitable companies including:

- Director voting under s195 of the Corporations Act: The Corporations Act 'turns off' the requirement in s191 of the Corporations Act for charitable companies for a director to notify the other directors of a material personal interest that relates to the affairs of the company. It is unclear how the restriction in s195(1) on directors voting on an issue in which they have a material personal interest applies to charitable

companies, as s195(1A)(b) states that s195(1) does not apply if the interest does not need to be disclosed under s191 (see ACNC Recommendation 17).

- Notice requirements for special resolutions: The ACNC Act provides that the provisions relating to meetings of members of companies in the Corporations Act, including s249L regarding notices of meeting for a special resolution, no longer apply to charitable companies. As such, it is unclear what the requirements for a special resolution are for charitable companies (see ACNC Recommendation 18).
- Auditor requirements for charitable companies that are small or medium registered companies (see ACNC Recommendation 19): We think that removing the requirement to appoint an auditor should only apply where no audit or review is required. As such, it will generally only apply to small companies limited by guarantee.

Reporting requirements

In relation to the recommendations made by the ACNC in its submission on reporting requirements for registered charities:

- Reporting frameworks for charities: The ACNC recommends in its submission that further work should be undertaken to develop a suitable reporting framework for registered charities (see ACNC Recommendation 21). We think that a starting point for this work should be that any reporting framework for charities should be consistent with that for other entities under the Corporations Act, except where there is a case for treating charitable companies differently.
- Annual application of proportional reporting requirements based on revenue thresholds: The ACNC suggested that registered charities should be able to self-assess their size for reporting purposes in a particular reporting period taking into account the immediately previous reporting period, or in the case of newly established charities, the projected revenue for the following reporting period (see ACNC Recommendation 22). We support confirmation of the size of the entities for the public record, which will also cause directors to turn their minds to the issue. The timing should be same as the financial reporting deadlines.
- Auditor's obligations: The ACNC recommends that the ACNC Act be amended to impose a similar duty as that which applies under s311 of the Corporations Act to report to ASIC in relation to the conduct of the audit of a registered charity (see ACNC Recommendation 24). We do not object to this recommendation. We note, however, that the auditors and audit are regulated by ASIC, so reporting to ASIC should be retained.
- Audit or review: The ACNC recommends that the ACNC Act be amended to give the ACNC Commissioner a discretion to permit a person who is taken to be a registered company auditor under s324BE(1) of the Corporations Act to undertake an audit of a large registered charity if the Commissioner reasonably believes that the requirement to have the audit undertaken by an entity specified in s60-30(1) of the ACNC Act will impose an unreasonable burden on that charity (see ACNC Recommendation 25). We

think this change may be appropriate to address concerns about the supply of auditors, although there is a risk that this would result in two tiers of auditors, which could be confusing.

Legislative consistency

We note that the Government is looking at modernising business registers as part of the Government's National Business Simplification Initiative (NBSI). We consider that this review is an opportunity to ensure legislative provisions in the Corporations Act and the ACNC Acts are consistent with the objective of the NBSI and a whole of government business registry platform.

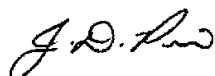
A modernised business registry will have the potential to bring together existing and future Government registration functions, making it easier for businesses to register, establish, and maintain their business registrations. Reliable, integrated data and common Application Programming Interfaces (APIs) can support expansion of the digital economy and open up more opportunities for innovation. Streamlined and consistent processes can make it simpler and easier for businesses, saving them time, decreasing their costs over time, and reducing red tape. ASIC would be happy to work with the Panel or Treasury to develop and implement any legislative reforms it thinks appropriate to facilitate a modernised business registry.

Responsible Person identification

ASIC notes the Government's initiative to seek the introduction of a Director Identification Number (DIN). Director identification will require a significant change to the ASIC company register and notifications about directors as well as assist with ensuring a director is not fictitious, deceased or a transient person. The DIN initiative could be relevant to the ACNC's proposed assessment of the suitability of responsible persons outlined in the ACNC submission to this Review.

If you have any questions, please feel free to contact Chloe Youl, Senior Manager, Strategic Policy (03) 9280 3670, chloe.youl@asic.gov.au or Kelly Fung, Lawyer, Strategic Policy (02) 9911 5207, kelly.fung@asic.gov.au.

Yours faithfully



John Price
Commissioner